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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-785

CONSUMERS UNION OF UNITED STATES, INC.,
Petitioner,

v.

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS, et al.,
Respondents.

REPLY OF PETITIONER TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

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This reply, filed pursuant to Rule 24(4) of the Rules of the Supreme Court, responds to arguments first raised by the Solicitor General in his Memorandum for the Respondents in Opposition to the Petition for a Writ of Certiorari. Petitioner submits that these arguments misconstrue the statutory allocation of jurisdiction between the Customs Court and the federal district courts.

I. THE CUSTOMS COURT HAS NO JURISDICTION OVER AN ACTION BROUGHT BY PETITIONER CONSUMERS UNION

The Solicitor General's Memorandum in Opposition suggests (p. 5, n.2) that Petitioner could challenge the Respondents' administration of Section 204 of the Agricul-

tural Act of 1956 [1] by filing suit in the Customs Court under 28 U.S.C. § 1582(a), following Petitioner's unsuccessful protest of an administrative decision excluding from this country textiles shipped in excess of the quotas imposed by Respondents. The Memorandum presumes (p. 5, n.2) that a protest would be filed first, because 28 U.S.C. § 1582(c) specifically denies jurisdiction to the Customs Court, *unless* "(1) either a protest has been filed, as prescribed by Section 514 of the Tariff Act of 1930, as amended, . . . or if the action relates to a decision under Section 516 of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted. . . ."

The Solicitor General does not dispute Petitioner's view (Pet. 18, n. 15) that Section 516 has no relevance to the present case. The only other mechanism for obtaining access to the Customs Court is through the filing of a protest "as prescribed by Section 514 of the Tariff Act of 1930, as amended." Under Section 514(b)(1), however, the only parties that may file a protest are:

> "the importer, consignee, or any authorized agent of the person paying any charge or exaction, or filing any claim for drawback, or seeking entry or delivery, with respect to merchandise which is the subject of a decision in subsection (a) of this action."

Petitioner Consumers Union is not such a party. The legislative history of Section 514 clearly shows that its basic purpose was to establish a protest mechanism for importers or other persons having a property interest in imported merchandise. Language of similar intent first appeared in the Customs Administrative Act of 1890, c. 407, § 14, 26 Stat. 137:

[1] Act of May 28, 1954, 70 Stat. 200, as amended by Pub. L. 87-488, 76 Stat. 104, 7 U.S.C. § 1854.

> "That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges . . . shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee or agent of such merchandise, or the person paying such fees, charges and exactions other than duties, shall within ten days . . . give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon."

Section 14 of the 1890 Act further provided for appeal from the collector to a "board of three general appraisers".[2]

The Payne-Aldrich Tariff Act of 1909, 36 Stat. 11, created the U.S. Court of Customs Appeals (36 Stat. 105), but preserved the language of the 1890 Act respecting who may file an appeal from the collector to the Board of General Appraisers. Section 29 of the 1909 Act bestowed the right to appeal decisions of the Board upon "the importer, owner, consignee or agent of any imported merchandise, or the collector or Secretary of the Treasury". (36 Stat. 107).

The Tariff Act of 1922 discarded the awkward and obscure words "agent of such merchandise" in favor of the language that appears today in Section 514, with a few later modifications not here relevant. The committee reports on the 1922 Act are almost silent on the reasons for the revision. But one comment by the House Ways and Means Committee reveals that Committee's

[2] This board was the predecessor of the Customs Court. See H.R. Rep. No. 91-267, 91st Cong., 2nd Sess., 1970 U.S. Code, Cong. & Adm. News 3189.

understanding of the original purpose of the protest mechanism:

> "The right of review by the Court of Customs Appeals of questions of law affecting the validity of reappraisement is extended to the Government. There is no reason why the Government should be denied this remedy *now afforded importers.*" (emphasis added).[3]

This understanding of the section was reaffirmed by the Ways and Means Committee in 1930, in its report on the Tariff Act of 1930:

> "Section 514 of the 1922 Act, relating to protest against collectors' decisions, provides that such decisions shall be final unless *the importer*, within 60 days, files a protest in writing with the collector . . ." (emphasis added).[4]

The decided cases underscore the rule that only a limited class of persons, basically importers, may utilize the protest mechanism which is prerequisite to the filing of an action in Customs Court. In *Hancock Gross Mfg., Inc.* v. *U.S.*, 400 F. Supp. 813, 815 (Cust. Ct. 1975), the Court stated:

> "Under Section 514 of the Tariff Act of 1930, the party filing a protest must be 'the importer, consignee, or agent of the person paying such charge or exaction'. Fundamentally, of course, the court lacks jurisdiction over a protest filed by a party which does not fall within one of the authorized classes of persons specified in section 514."[5]

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[3] H.R. Rep. No. 248, 67th Cong., 1st Sess. 26 (1921).

[4] H.R. Rep. No. 7, 71st Cong., 1st Sess. 178 (1929).

[5] *Accord: United States* v. *Sherman & Sons Co.*, 237 U.S. 146, 152; 35 S.Ct. 520, 523; 59 L.Ed. 883 (1915); *United States* v. *Wedemann, Godknecht, Inc.*, 515 F.2d 1145, 1147 (C.C.P.A. 1975); *Border Brokerage Co.* v. *United States*, 314 F. Supp. 788, 791 (Cust. Ct. 1970).

Petitioner Consumers Union is not an importer, consignee or authorized agent of any person paying any charge or exaction. The complaint below alleges the status of Consumers Union and its members as "purchasers and consumers of textiles and textile products which are or may be subject to quantitative import limitations." Complaint, ¶ 3. The complaint further alleges that Consumers Union and its members are and will be injured "*in their capacity as consumers*, by the imposition of restraints on the importation of textiles and textile products in the absence of legally required determinations . . ." (emphasis added). Complaint, ¶ 18. The $15,000 worth of textiles that Petitioner purchases annually for testing and other purposes is purchased at retail to ensure that the merchandise tested is representative of items sold to members and consumers. For these reasons, Petitioner does not and could not qualify as an importer within the meaning of Section 514(b)(1). Accordingly, Petitioner could not file a protest under Section 514, nor bring suit in the Customs Court under 28 U.S.C. § 1582.

II. THE UNAVAILABILITY OF CUSTOMS COURT JURISDICTION ACTS TO CONFER JURISDICTION UPON THE DISTRICT COURT

Petitioner's exclusion from the Customs Court brings this case within the "exceptional class of cases" to which the Second Circuit referred in *Sneaker Circus, Inc.* v. *Carter*, 566 F.2d 396, 399 (1977). In each of these cases, a court held that the unavailability of the Customs Court acts to confer original jurisdiction on the district court.[6]

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[6] In *Timken Co.* v. *Simon*, 539 F.2d 221 (D.C. Cir. 1976), a domestic manufacturer sought an injunction from the district court to force the Secretary of the Treasury to impose an anti-dumping duty on imported merchandise, under the Anti-Dumping Act, 19 U.S.C. §§ 160 *et seq.* The court found that because goods had entered the country prior to the effective date of the Act, and

These holdings followed and upheld the presumption of availability of judicial review of administrative decisions, reflected in numerous Supreme Court cases.[7]

Petitioner's Memoranda and briefs in the District Court[8] and Court of Appeals[9] advanced and developed the contentions that the Customs Court is not empowered to hear cases brought by consumers, and that claims that the Customs Court cannot hear should be heard in the district court.

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because the Act functioned prospectively, there could be no protest under Section 516, and thus no access to the Customs Court. The Court of Appeals concluded: "Since Timken has *no remedy* pursuant to section 516 in the Customs Court, we decline to hold that the District Court lacked jurisdiction over this action." (emphasis in original). 539 F.2d 226, n.7. In *National Milk Producers Federation* v. *Shultz*, 372 F. Supp. 745 (D.D.C. 1974), the court accepted jurisdiction of a challenge by milk producers to the Secretary of the Treasury's refusal to assess countervailing duties against imported dairy products. In view of an earlier holding that American manufacturers could not bring an action in the Customs Court respecting countervailing import duties, the district court took jurisdiction, ruling that the unavailability of jurisdiction in the Customs Court "acts to confer original jurisdiction upon this court under 28 U.S.C. § 1340." 372 F. Supp. 746. *See also Consumers Union of United States, Inc.* v. *Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *J.C. Penney Company* v. *United States Treasury Department*, 439 F.2d 63, 68 (2nd Cir. 1971), *cert. denied*, 404 U.S. 869 (1971).

[7] *See, e.g., Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Pillai* v. *Civil Aeronautics Board*, 485 F.2d 1018 (D.C. Cir. 1973); *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F.2d 1093, 1100 (D.C. Cir. 1970); *American Airlines, Inc.* v. *Civil Aeronautics Board*, 348 F.2d 349 (D.C. Cir. 1965); *Imbert Imports, Inc.* v. *United States*, 314 F. Supp. 784 (Cust. Ct. 1970); *aff'd* 331 F. Supp. 1400 (Cust. Ct. 2d Div. App. Term 1971), *aff'd* 475 F.2d 1189 (C.C.P.A. 1973).

[8] Memorandum of Points and Authorities in Opposition to Defendants' Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment and in Support of Plaintiff's Cross-Motion for Partial Summary Judgment 69-74.

[9] Reply Brief of Plaintiff-Appellant, 9-15.

The decision of the Court of Appeals in the present case has the effect of denying consumers access to *any* forum. Consumers such as Petitioner cannot fit into the Court of Appeals formula:

> ". . . if anyone wishes to challenge the Committee's action, he can do so as other challenges of that nature are made, i.e. as an importer or as an American manufacturer, producer or wholesaler, bringing textiles into the United States." 561 F.2d 872, 874 (Pet. 20a).

Contrary to the assertion of the Solicitor General, the holding of the Court of Appeals conflicts directly with decisions in this and other circuits to the effect that a plaintiff whose complaint challenges the imposition of restraints or imports, but who does not meet the requirements of 28 U.S.C. § 1582, may sue in the district courts.

Respectfully submitted,

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